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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-652

FRANKLIN H. LITTELL,

Petitioner,

v.

WILLIAM F. BUCKLEY, JR.,

Respondent.

RESPONDENT BUCKLEY'S ANSWERING BRIEF

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Petitioner Littell asserts, first, that the part of the judgment against him which was upheld by the Court of Appeals relates to a constitutionally protected statement of opinion and, if not, that Buckley did not show actual malice; and, second, that the First Amendment forbids punitive damages in a libel action. We shall discuss these contentions in order.

POINT I

The Defamatory Assertion Was One of Fact and Made With Actual Malice.

The published statement held to be libelous is not correctly stated in the petition under "Questions Presented". The actual statement was as follows: "Like Westbrook Pegler, who lied day after day about Quentin Reynolds and goaded him into a lawsuit, Buckley could be taken to Court by anyone of several people who had enough money to hire competent legal counsel and nothing else to do" (26a of appendix in No. 76-652).

The arguments made here by Littell were made in, and rejected by, both lower Courts. As the Court of Appeals said, the libelous statement is "a factual assertion relating to Buckley's journalistic integrity" (26a).

As shown in the opinion of the District Court, Littell admitted that he did not believe the assertion and described it as "infelicitous" (99a).

He further admitted that he did not know of any instance in which Buckley was guilty of the kind of defamation for which Pegler was found to have committed libel (79a-80a).

Space does not permit a detailed answer to Littell's presentation of the commentaries on the various individuals referred to in the petition. Suffice it to say that, if the comments published in National Review warranted the characterizations of the petition, its relatively small (100,000-110,000) readership, consisting largely of conservative intellectuals, would find them distasteful. Similarly, the editors of the newspapers which subscribe to Buckley's column would not permit them to appear in their pages. Cf. 69a.

POINT II

The Doctrine That Public Figures May Recover Punitive Damages Does Not Call for Reconsideration. Even If It Did, This Is Not the Case for Such Reconsideration.

In *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130 (1967), this Court upheld a large recovery in punitive damages for libel of a public figure. In *Goldwater* v. *Ginzburg,* 414 F. 2d 324 (C.A. 2d 1969), the Court of Appeals upheld an award of most substantial punitive damages to a public figure. Compensatory damages in that case were also $1. This Court denied certiorari in 1970 (396 U.S. 1049).

There is nothing in *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323 (1974), to the contrary. That case dealt with the rights of a private person and contains no language overruling or inconsistent with *Curtis Publishing Co.* v. *Butts.* Since *Gertz* the courts of appeals have uniformly held that that decision did not affect the right of a public figure to recover punitive damages. *Drotzmans* v. *McGraw-Hill,* 500 F. 2d 830, 836 (C.A. 8th, 1974); *Davis* v. *Schuchat,* 510 F. 2d 731, 737 (C.A.D.C. 1975); *Appleyard* v. *Transamerican Press,* 539 F. 2d 1026, 1029 (C.A. 4th, 1976) (excellent analysis of *Gertz* as relevant to this issue).

In any event, this is hardly the case in which to reconsider the doctrine. The exceedingly small award of $1,000 made by the Court of Appeals will, let us hope, serve as some deterrent against defamation with actual malice of Buckley and other public figures. A public figure is ordinarily unable to prove what damages he has suffered. In Buckley's case, who knows what advertising National Review or his TV program have failed to receive, or what

newspapers have failed to subscribe to his column, by reason of this book? One thousand and one dollars damages provides some protection, if not very much.

CONCLUSION

Unlike the petition in No. 76-644, the petition in No. 76-652 presents no issues deserving the attention of this Court. The petition in No. 76-652 should be denied.

Respectfully submitted,

Dated: New York, N.Y.
November 29, 1976

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